United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1027

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To be argued by
SHEILA GINSBERG

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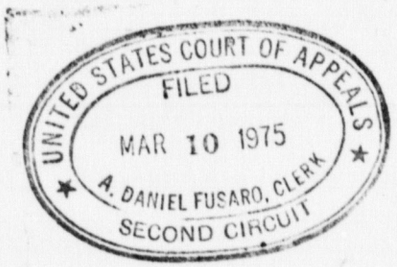
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- ANTHONY TAVOULARIS, VINCENT POERIO, and LOUIS DANIELS, Appellants.	Docket No. 75-1027

BRIEF FOR APPELLANT
LOUIS DANIELS

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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BRIEF FOR APPELLANT LOUIS DANIELS

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether reliance solely on the inference from possession to prove that appellant had the requisite knowledge that the Treasury bills were stolen from a bank violated his Fifth Amendment right to due process of law.

2. Whether the judicial and prosecutorial attack on the testimony of a witness critical to the defense denied appellant his right to a fair trial and mandates reversal.

3. Whether the case must be remanded for a hearing to determine whether the Strike Force attorney who presented the case to the grand jury was authorized to do so.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

On November 17, 1975, appellant Daniels was convicted of conspiracy to possess (count one), and of the substantive crime of possession of United States Treasury bills, in violation of 18 U.S.C. §2113(c) (count two). The trial was held in the United States District Court for the Eastern District of New York before The Honorable Thomas C. Platt and a jury. Appellant Daniels was sentenced to a three-year term of imprisonment on each count, pursuant to 18 U.S.C. §4208(a)(2), the sentences to run concurrently.

The District Court granted leave to appeal in forma pauperis, and this Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Daniels and Anthony Tavoularis and Vincent Poerio were charged in a two-count indictment,* along with three unindicted co-conspirators, Joseph DiRenzo, Stuart Norman, and Melvin Berman, with conspiring, in violation of 18 U.S.C. §371,

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*The indictment is "B" to appellant's separate appendix.

to possess United States Treasury bills taken from the Morgan Guaranty Trust Company (count one), and with the possession of the Treasury bills knowing that they were taken from a bank, in violation of 18 U.S.C. §2113(c)* (count two).**

The Government's theory of the case was that the unindicted co-conspirators, along with Tavoularis, Poerio, and Daniels (not all of whom knew each other), formed a loose chain through which the stolen Treasury bills passed in the hope of an ultimate sale. According to this theory, the stolen bills passed from Poerio who, at appellant Daniels' instigation, gave them to Norman who, through Berman, gave them to Tavoularis. Tavoularis was, according to this theory, to make the final transfer to DiRenzo, a government informant. There was no proof that Poerio was the first link in the chain.

Harold Connor, an Assistant Vice-President at Morgan Guaranty Trust Company, testified for the Government as to the bank's acquisition of substantial blocs of Treasury bills from which the missing bills, subsequently introduced by the Government, had disappeared (41-43***). He explained that the bills might be

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*A prior trial in December 1972, charging only Anthony Tavoularis with this crime, ended in a mistrial when the jury was unable to reach a verdict.

**The record reveals that from its inception the case was assigned to the Strike Force, and that Special Assistant Fred E. Barlow presented the case to the grand jury for indictment.

***Numerals in parentheses refer to pages of the transcript of the trial.

purchased from either the Federal Reserve Bank or from what he called the "secondary" market, composed of various Government bond dealers such as Aubrey G. Lanston & Co. or the Francis I. DuPont Co.* Connors described the area in the bank where the bills are kept as physically secure, protected by armed guards, and accessible only to authorized personnel (40, 63). The bills were discovered missing in the latter part of October 1969 during the banks' regular weekly compilation of all securities in the bank's custody (52). A search of the bank records and the subsequent investigation did not result in finding the missing bills** (52-53). There were no markings on the face of any of the bills to indicate that they had been in the custody of the Morganty Guaranty Trust Company (57).

Joseph DiRienzo, whose nickname is "Monkey" (196), was a government informant who testified concerning his meetings and conversations with Tavoularis and Norman about selling the stolen bills. DiRienzo's criminal record consisted of 1968, 1972, and 1973 convictions for petty larceny (293-295). The latter two convictions concerned crimes committed after DiRienzo had begun to work with the Government on this case. Not only did the pro-

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*Connor's testimony concerning the bond market was given in an aborted prior trial which ended in a mistrial because of the death of Tavoularis' father. The references to this earlier testimony are found on pages 32, 38, and 40 in the transcript dated October 24, 1974.

**By stipulation, it was established that Morgan Guaranty Trust Company was in 1969 and 1970, and is today, a member of the Federal Deposit Insurance Corporation.

secutors help DiRienzo with the sentences imposed on his larceny convictions (315), the agents paid the rent on his apartment for two months (299). Although DiRienzo received a $10,000 reward from Morganty Guaranty Trust Company (308), he did not file an income tax return reporting this increase in his income (541).

According to DiRienzo, some time at the end of February 1970 he met Anthony Tavoularis,* as he had frequently done before, at Frank's Luncheonette on East New York Avenue in Brooklyn (196-197). On this particular morning, Tavoularis asked DiRienzo** if he knew anyone who could negotiate some Treasury bills worth about three million dollars (200). DiRienzo, misreporting the fact, said that he did, and further promised to check on the feasibility of making the sale (200). On the following day DiRienzo, continuing the charade, said his man was interested, would pay eleven or twelve per cent of the value, but needed to see a copy of one of the bills (202). After some delay Tavoularis took DiRienzo to a house, one he later learned was the residence of Melvin Bernan (212). Leaving DiRienzo in the car, Tavoularis entered the house and returned with a sample

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*Tavoularis presented a tape recording (770a) of two telephone conversations with DiRienzo and a note, as well as the testimony of Tony Manero (757-769), Dolores Tavoularis (734-750), Rosa Tusa (750-752), and Pat Dennis Manero (802-806), all to establish that DiRienzo had previously stated that Tavoularis was innocent and that DiRienzo had tried to extort money in exchange for his disappearance before trial.

**DiRienzo did not know appellant or of his existence (297).

bill (205). DiRienzo took the bill home on the pretense of showing it to the buyer. After checking with his mythical purchaser, he returned the sample, reporting that the buyer agreed to the deal (208).*

Three days later, on March 3, Tavoularis and DiRienzo made another trip to Berman's house to pick up the bills, but the bills were not available. Later that night Stuart Norman, the bills in hand, met Tavoularis and DiRienzo, but DiRienzo, unable to reach the agents, postponed the deal until the next morning. On March 4, 1974, DiRienzo met Tavoularis and Norman at Frank's Luncheonette (219-220). Norman had the bills, which he showed to DiRienzo (220). The three men then left the luncheonette, expecting to drive to the buyer. On a pre-arranged signal from DiRienzo, they were arrested (223).

Stuart Norman, another witness for the Government, had pleaded guilty to a conspiracy charge in an earlier indictment, was sentenced to a five-year term of imprisonment, and is currently released on parole (608). He admitted that during the time he was in prison, the United States Attorney's office made arrangements to have him brought to New York no less than seven or eight times on the pretext that he needed to discuss the case, when in reality he was brought each time at government expense

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*On March 2, 1970, DiRienzo called the Federal agents and reported the proposed deal. Richard Jaben, a Special Agent with the United States Secret Service, testified as to his subsequent surveillance at Frank's Luncheonnete, where he observed Tavoularis and DiRienzo, and to the arrest (74-129).

to see his wife (640). Moreover, the prosecutors wrote three letters to Norman's parole board urging his early release, and actually represented to the board that it would "facilitate his testimony" if he were paroled (633, 637).

Norman was engaged in the vending machine business. In late 1969 he had juke boxes, pool tables, and pinball machines in forty or fifty locations throughout New York City (588). Appellant Daniels was the manager of the Williams Brothers Bar, where Norman had one of his machines (590). According to Norman, he had lent appellant approximately $2,000 to enable appellant to buy the Williams Bar.* Norman further testified that he had also lent $2,000 to Melvin Berman who, coincidentally, was trying to buy John's Bar where Berman worked (591). Some time "late in 1969" appellant Daniels allegedly asked Norman if he knew where to get rid of stolen securities (592, 595). At first Norman responded that he did not, but, as luck would have it, Berman then approached Norman asking if the latter knew of a "good deal" to make quick money (593). The two went to appellant's apartment, but Norman alone went in to see appellant. Daniels said he would have to check to see if the securities were still available. After a phone call, appellant Daniels returned to say that the deal was possible but that the items were "Treasury bills, not securities" (595-596). At a subsequent meeting at appellant Daniels' apartment, Norman met

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*At the prior 1972 trial of Tavoularis alone, Norman asserted that the amount was $3,000 (616).

Vincent Poerio. Poerio insisted on meeting Berman, who was again waiting outside. After adjourning the meeting to the car, it was agreed that Berman and Norman would get a sample of the bills (596-597). Toward that end, in late February appellant Daniels took Norman to a bar on Third Avenue in Brooklyn, where the two met Poerio. Poerio had a sample $100,000 Treasury bill (598-599.* Norman took the bill to Berman's house, where they were later joined by Tavoularis (600). The next day Norman retrieved the bill from Berman and returned it to appellant Daniels (602).**

A few days later, Norman asserted, he got a package of the bills from Poerio and appellant (at the 1972 trial of Tavoularis he explicitly testified that he got the bills from Poerio alone (621)), and that night met Tavoularis and DiRienzo at a bar, but the sale did not take place (603). Norman then returned with the bills to Poerio and Daniels, and Poerio made a telephone call to see if they could keep the bills until the following day.(604). Because he got approval to retain the bills, Norman was able to meet Tavoularis*** and DiRienzo the following morn-

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*The Government also presented the testimony of Robert Hazen, a fingerprint specialist employed by the Federal Bureau of Investigation (423-453). Hazen testified that he found appellant Daniels' fingerprints on a $40,000 Treasury bill (Government Exhibit #6) recovered from Norman at the time of his arrest (427).

**Later he conceded that at a prior trial he had testified that he returned the bills to Poerio (839-840).

***Tavoularis presented the testimony of Frank Tusa (721-725) and Salvatore Messineo (806-811) to establish that Tavoularis met Norman on March 4 to give him a key to one of Messineo's buildings so that Norman could remove his vending machine equipment.

ing at Frank's Luncheonette where, shortly thereafter, the bills in his pocket, he was arrested (606-607).

At the close of the Government's case, counsel moved for a directed verdict of acquittal on the ground that the Government had failed to prove that appellant Daniels knew, as the statute requires him to know, that the bills were taken from a bank (677-707). The District Court denied the motion on the ground that recent possession will support the inference that the possessors participated in the theft* (690, 699).

The defense called Melvin Berman, whose testimony was critical to appellant Daniels' case. Counsel for Poerio was to begin the examination, but before he was permitted to do so Judge Platt, who had not interfered with the testimony of any other witness, assumed the inquiry of the witness concerning his background.**

Under examination by counsel, Berman testified that he did not know either Poerio or appellant (815, 825),*** and further that Tavoularis, whom he knew, and Norman had never been at Berman's house together (824). Thus, this testimony squarely

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*Judge Platt apparently believed that the knowledge requirement on the conspiracy count was less demanding than it was on the substantive count. He found that Daniels' alleged statement that the "securities were stolen" coupled with Connors' testimony that the bills were missing from the bank was sufficient proof of knowledge (679, 688).

**Defense counsel objected.

***Berman also contradicted Norman's assertion that in 1969 Berman worked at John's Bar. According to Berman, at that time he operated his own soda delivery service (814).

contradicts Norman's assertions as to who attended various meetings and consequently who participated in the deal.

On cross-examination, the prosecutor sought to establish that Berman had on previous occasions refused to cooperate with the Government. When the witness explained that his failure to answer the Government's subpoena for the earlier trial in 1972 was because of the fact that he mistakenly went to the court house in Brooklyn instead of to the one on Long Island. Judge Platt joined in the cross-examination with the following inquiry:

> [THE PROSECUTOR]: Did you ever get to Long Island, to the Courthouse?
>
> [THE WITNESS]: No.
>
> THE COURT: Were you under subpoena?
>
> THE WITNESS: Yes.
>
> THE COURT: And you didn't comply with the subpoena?
>
> THE WITNESS: I appeared in Brooklyn the day I was to appear.
>
> THE COURT: What did the subpoena say? To appear in Brooklyn or Westbury?
>
> THE WITNESS: It said Federal Court. I suppose it said Westbury, your Honor --
>
> THE COURT: And you didn't obey the Court's subpoena?
>
> THE WITNESS: I did to the best of my ability.
>
> THE COURT: Mr. Berman, did you read the

subpoena?

THE WITNESS: Yes.

[DEFENSE COUNSEL]: I am going to object to this entire questioning.

THE COURT: You are overruled.

Did the subpoena say Westbury?

THE WITNESS: I imagine it did, your Honor.

THE COURT: And you didn't obey the subpoena?

THE WITNESS: As I say --

THE COURT: Now, listen to me. Did the subpoena say Westbury?

THE WITNESS: I believe so.

THE COURT: And you didn't go to Westbury?

THE WITNESS: Not that particular day, no.

THE COURT. All right. You may proceed.

(817-818).*

When the prosecutor resumed cross-examination, he embarked, over defense counsel's repeated objections (819-820), upon a series of questions designed to pit his credibility against that of the witness:

[THE PROSECUTOR]: Remember having a telephone conversation with me about two months ago?

[THE WITNESS]: I don't even remember your name, sir.

Q My name is Mr. Dougherty.

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*Counsel objected strenuously not only to the Judge's participation in the cross-examination, but also to the tone of the Judge's voice in posing his questions (817, 820-821).

A Dougherty, yes.

Q Was that pursuant to a letter received from me regarding the trial of this case?

A Yes.

Q And do you remember the sum and substance of that conversation you had with me?

A Basically, yes.

(818).

* * *

Q Do you recall making an appointment to come into my office for a particular date?

[DEFENSE COUNSEL]: Your Honor, jumping up, [sic] Judge, may I have a continuing objection to that question?

THE COURT: Yes. Your objection is overruled.

THE WITNESS: Ask me that again, sir.

Q Do you recall making an appointment to come into my office for a particular day?

A No.

Q You don't recall that?

A No. Not for a particular day. You said at my convenience, if I recall.

Q Did you tell me you were going to come into my office?

A I said in the near future, yes.

Q Did you ever come into my office?

A No, but I was --

Q Have you moved in the last few weeks?

A Yes.

(821-822).*

Finally, despite repeated prodding by the prosecutor, the witness unequivocally denied ever telling Agent David Cassens that he (Berman) got the bills in a bar from "Vinnie" (829, 831).

In rebuttal, the Government presented the testimony of David Cassens, a special agent with the FBI (852-879), and Fred Barlow, a special attorney with the Justice Department (880-885). Cassens asserted that Berman, when asked the source of the stolen Treasury bills for which he was arrested, Berman responded that he got the bills from Poerio in a bar (856). However, on cross-examination it was established that Berman was never arrested for crimes arising from the possession of these bills (877). Moreover, the agent's memorandum commemorating the substance of this alleged interrogation is no longer extant (854). Barlow testified that not only did he never see the agent's missing report, but also that Cassens never told him that Berman admitted getting the bills from Poerio (883).

Summation by the prosecutor inspired several objections by all defense counsel (1032-1038) on the ground that the prosecutor, through his prejudicial remarks, was injecting his own credibility and that of his office into the jury's deliberations of the case.

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*In answer to subsequent questions put by counsel for Tavalouris, the witness explained that he had, in fact, on three or four occasions, talked with either agents or prosecutors concerning the case (823).

Several times he told the jury what he thought of the evidence and why he thought they should return a verdict of guilty (984, 994, 1003, 1010).

Moreover, in reference to defense witness Berman, the prosecutor remarked:

> ... If you want to believe Mel Berman, that pyramid of virtue and honesty, then you believe him.
>
> I submit if you believe them, we can pretty much bet J. Edgar Hoover will roll over in his grave.
>
> (1027).

Motions for a mistrial were denied (1039-1040).

The Court charged the jury* extensively about the conspiracy, specifically directing:

> Four essential elements are required to be proved in order to establish the offense of conspiracy charged in the indictment:
>
> One, that the conspiracy described in the indictment was wilfully formed and was existing at or about the time alleged;
>
> Two, that the accused wilfully became a member or members of the conspiracy;
>
> Three, that one of the conspirators thereafter, knowingly committed at least one of the overt acts charged in the indictment at or about the time and place alleged; and
>
> Four, that such overt act was knowingly done in furtherance of some object or purpose of the conspiracy as charged.
>
> (1053-1053a).

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*The entire charge is "C" to appellant's separate appendix.

On knowledge for the conspiracy count, the Judge charged:

> One may become a member of the conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator.
>
> (1057-1058).

On the substantive count, the Court charged:

> Now, the essential elements of the crime charged in Count Two of the indictment -- and I ask you to listen to these carefully -- are as follows:
>
> One, that the defendants possessed United States Treasury bills.
>
> Two, that such United States Treasury bills exceeded in value one hundred dollars.
>
> [Three], that such possession was done knowingly and intentionally.
>
> [Four], that the United States Treasury bill or bills had been taken and carried away with intent to steal or purloin from the care, custody, control and management of a bank, and
>
> [Five], that at the time of possession, the defendants knew that such property or money or other thing in value had been so taken from a bank.
>
> [Six], at the time the bills were stolen, they were in the care, custody and control and management of the Morgan Guaranty Trust Company of New York.
>
> (1063-1064).

On the critical question of knowledge, the Judge directed only that "circumstantial evidence may be sufficient to prove that the defendants knew that the bills were stolen from a

bank" (1065), and then:

> Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and though only prima facie evidence of guilt, may be of controlling weight unless explained by the circumstances, or accounted for in some way consistent with innocence.
>
> (1065-1066).

The jury was also told that on the element of knowledge they need not find that the defendants participated in any way in the theft (1064).

After lengthy deliberation, during which the jury asked that Stuart Norman's testimony be re-read (1097), the jury returned a verdict of guilty as to all three defendants on both counts.

STATUTORY PROVISIONS INVOLVED

TITLE 18, UNITED STATES CODE

§ 2113. Bank robbery and incidental crimes

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, credit union, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

ARGUMENT

Point I

RELIANCE SOLELY ON THE INFERENCE FROM POSSESSION TO PROVE THAT APPELLANT HAD THE REQUISITE SPECIFIC KNOWLEDGE THAT THE BILLS WERE STOLEN FROM A BANK VIOLATED HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

-A-

Title 18, United States Code, §2113(c), explicitly premises liability for the unlawful possession of the subject property upon the knowledge that the property had been taken from a bank. The prosecutor knew that his case was devoid of any evidence to establish that appellant knew that the United States Treasury bills found in Stuart Norman's possession at the time of his arrest were taken from a bank. Instead, the Government sought to rely on an inference that knowledge came from the mere fact of possession of the "recently" stolen bills. The trial judge's acceptance of this theory was error.

While possession of property recently stolen, when coupled with other suspicious and unexplained circumstances, will support the common law inference that the possessor knew the property was stolen (Barnes v. United States, 93 S.Ct. 2357 (1973))*, it

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*In Barnes, supra, 93 S.Ct. at 2362, the possession of checks payable to persons unknown to the defendant who presented no plausible explanation for his possession resulted in the "common sense conclusion" that he was aware of the high probability that the checks were stolen.

will not establish the knowledge essential to liability here. Section 2113(c) requires knowledge of a more restrictive and exacting nature.

Demonstrative of this limitation on the valid inference to be drawn from mere possession, and directly analogous here, is the legislative history of the statute sanctioning receipt of stolen mail, 18 U.S.C. §1708. The predecessor statute, 18 U.S.C. §317, ed. 1934, required that possession be with the specific knowledge that the property was stolen from the mail. In prosecutions under that law, simple possession was insufficient to establish the requisite knowledge.* United States v. Brandenberg, 28 F.2d 811 (3d Cir. 1935).

Even if the inference from possession will, in this case, suffice to establish appellant's knowledge of the stolen character of the bills -- a knowledge that Stuart Norman testified appellant actually had** -- the further inference that possession permits the conclusion that appellant knew the bills were taken from a bank is constitutionally impermissible. This inference is valid only if it is shown with "substantial assurance" that the presumed fact is more likely than not to flow from the

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*Consequently, in 1939 Congress amended the statute, unnecessary legislative action if the inference from possession were deemed enough, to relieve the Government of the obligation of proving "also that the defendant knew theproperty received had been stolen from the mail." H.R. Rep. No. 734, 76th Cong., 1st Sess., p.1 (1939).

**Norman testified that appellant asked if he knew how to get rid of stolen securities.

proved fact on which it is made to depend. Barnes v. United States, supra, 93 S.Ct. at 2361, quoting from Leary v. United States, 395 U.S. 6, 36 (1969);** see also Turner v. United States, 396 U.S. 398 (1970); United States v. Romano, 382 U.S. 136 (1965); United States v. Gainey, 380 U.S. 63 (1965); Tot v. United States, 319 U.S. 463 (1943).**

On the facts of this case, that simply cannot be done. The test of the rationality of an inference is a highly empirical one requiring analysis of the factual context in which the inference is intended to function. Leary v. United States, supra, 395 U.S. at 38; United States v. Gainey, supra, 380 U.S. at 67. The analysis of whether a person who possesses United States Treasury bills is more likely than not to know that they came from a bank must begin with a survey of the various sources of Treasury bills. Unlike the situation in Turner v. United States, supra, 396 U.S. at 416, where the Court held that heroin found in this country is tantamount to imported heroin, Treasury

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*The Court, in Leary v. United States, 395 U.S. 6, 36 n.64 (1969), and in subsequent cases, found it unnecessary to decide whether the inference that "passes muster" by the "more likely than not" standard must, in a criminal case, then be evaluated by the more stringent standard of "beyond a reasonable doubt." Implicit in appellant's challenge to this inference on the "more likely than not" standard is the assertion that it clearly does not, as it must (In re Winship, 397 U.S. 258, 364 (1970)), satisfy the proof beyond a reasonable doubt requirements.

**Barnes v. United States, supra, explicitly applies the logic of the cases analyzing statutory presumptions to an evaluation of the common law inferences in Barnes, the inference of knowledge of stolen character from possession of goods recently stolen.

bills can be, and with regularity are, obtained from suppliers other than banks.

Harold Connor, an Assistant Vice-President of the Morgan Guaranty Trust Company, testified at trial that Treasury bills are frequently purchased in what he referred to as a "secondary market," consisting of government bond traders. Specifically, he enumerated that these traders are companies such as Aubrey G. Langston and Company and Francis I. DuPont and Company where, in fact, Morgan Guaranty Trust had purchased Treasury bills in blocs of twenty-five million dollars and seven million dollars, respectively. It was from these large blocs that bills subsequently found in the possession of Norman had originated. See also United States v. Jacobs, 475 F.2d 270, 274 (2d Cir. 1973), where this Court considered the theft of one and a half million dollars in United States Treasury bills from Brown Brothers, Harriman & Co.

While the record does not establish the exact percentage of the market in Treasury bills which is handled by institutions other than banks, it does make plain that trading houses, not covered by §2113, deal in substantial quantities of these bills. This being so, it cannot be taken as self-evident, even if banks were found to have custody of the major porition of Treasury bills, that a simple possessor would be aware of these percentages. Leary v. United States, supra, 395 U.S. at 46.

There is no other evidence to meet the burden of proof required. According to Connor, there was nothing on the face

of the bills to indicate that their origin had been the Morgan Guaranty Trust Company. See United States v. Hamilton, 457 F.2d 95 (3d Cir. 1972). Nor can it be inferred from any of the evidence at trial that appellant participated in the theft, and therefore knew that the bills were taken from a bank. Again, according to Connor, the area in the bank where the bills were kept was physically secure, protected by armed guards and accessible only to authorized bank personnel. Therefore, unless there had been a burglary of the bank, and that is not so much as intimated by the record, the bonds most probably were taken by someone authorized by the bank to be in the custody area.* That category of persons, by definition, excludes appellant, who was, as the record reveals, only the manager of the Williams Bar.

Further, the Government's theory of the case and all its proof established that appellant was not the first link in the chain of possession after the bills had been taken. When appellant allegedly suggested the deal to Norman, there is no

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*This conviction should be reversed also for a failure of the Government to prove, as §2113(c) requires, that the bills were taken with intent "to steal and purloin" in violation of §2113(b). Because the evidence presented is as susceptible to a finding that the bills were embezzled (18 U.S.C. §656) as it is to a finding that they were larcenously taken, another element of the crime has not been proved. LeMasters v. United States, 378 F.2d 262 (9th Cir. 1967); United States v. Rogers, 289 F.2d 483 (4th Cir. 1961). This Court's opinion in United States v. Fistel, 460 F.2d 157 (2d Cir. 1972), to the contrary on this issue, should be overruled.

evidence that he had the bills in his possession. Indicative of the fact that at that time appellant had not even seen the bills is Norman's testimony that appellant did not know that the deal would involved United States Treasury bills, and referred to them only in the generic term as "securities." Moreover, when Norman finally approached appellant indicating his readiness to do the deal, appellant not only did not have the bills, he also did not know whether they were still available. Certainly if the thief were still involved at this subsequent time, his connection with the stolen goods would permit him to know if the merchandise had been sold. Only after a telephone call to some unnamed party did appellant learn that the items were Treasury bills and that they were still for sale. Further evidence of appellant's non-participation in the theft of the bills and his peripheral connection to their disposition is the fact that it was Poerio, and not appellant, who insisted on meeting Berman before discussion of the deal continued; it was Poerio who obtained the sample bill; and it was Poerio who provided the ultimate package of bills for sale. Significantly, when the sale was postponed, Poerio and appellant had to inquire, again of some unnamed person, whether they could retain the bills until the following morning.

The trial judge acknowledged that the jury could not, on these facts, find participation in the theft, when he instructed the jury that they need not find such participation in order to

find the requisite knowledge.*

On this record, to allow the inference of the requisite knowledge of the source of the bills from the mere fact of possession is to allow conviction based on pure speculation. To do so is violative of appellant's Fifth Amendment right to due process of law. The evidence being insufficient to support the verdict on either count, the conviction must be reversed and the indictment dismissed.**

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*Ironically, it was this exact inference of participation in the theft on which Judge Platt erroneously relied in denying the defense motion for a judgment of acquittal. The Judge mistakenly found Crone v. United States, 411 F.2d 251 (5th Cir. 1969), to be dispositive. Not only is the record in Crone devoid Iin marked contrast to the instant case) of any indication that the defendants received the goods from other persons, but also there is an indication in the opinion that the goods, there travelers' checks, possessed were embossed with the name of the bank. Id. at 253. Moreover, to the extent that Crone can be read as authority for the proposition that mere possession of recently stolen property alone will satisfy the knowledge requirement of §2113(c), it is of little weight today. Crone was decided one day before the Supreme Court decision in Leary v. United States, supra, and it no doubt was written and handed down before the opinion in Leary was determined, for nowhere in his opinion does Judge Fisher address the critical analysis of the presumptions and inferences set forth by the Supreme Court in Leary.

**Contrary to Judge Platt's understanding of conspiracy law, the knowledge that the bills were taken from a bank is as essential to the conspiracy count as it is to the substantive count. Ingram v. United States, 360 U.S. 672, 678 (1959); United States v. Hysohion, 448 F.2d 343, 347 (2d Cir. 1971), and the cases cited therein.

Even if it were proper to infer the requisite knowledge from possession, the Judge's failure properly to charge on the inference mandates reversal.

While the jury was told that, on the substantive charge of possession, the Government must prove knowledge that the bills were taken from a bank, the instruction which followed, concerning the sufficiency of the evidence to satisfy that burden, precluded an adequate finding by the jury on that element. The total of the District Court's instruction on the evidence sufficient to find knowledge was as follows:

> ... [I]t is not necessary for you to find that the defendants participated in the taking away or theft in any way, or that they knew that the person from whom they received the bills had participated in the theft. It is also unnecessary for you to find that these defendants, or any person from whom they received the bills, knew the particular bank from which the money was taken, or whether it was a bank insured by the Federal Deposit Insurance Corporation.
>
> Circumstantial evidence may be sufficient to prove that the defendants knew that the bills were stolen from a bank.
>
> * * *
>
> Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and though only prima facie evidence of guilt, may be of controlling weight unless explained by the circumstances, or accounted for in some way consistent with innocence.
>
> (1064-1066).

The deficiencies in this instruction are several. The Judge, relying on Crone v. United States, supra, 411 F.2d at 254, ruled that the Government's proof of appellant's possession was sufficient to establish that he knew that the bills were taken from a bank. However, the logic of Crone and the cases upon which it, in turn, relied, is that such possession of "recently" stolen property gives rise to the inference that the possessor participated in the theft. Logically, participation in the theft would provide knowledge of the source of the materials involved. However, despite reliance on this logic, the Judge specifically, albeit inexplicably, instructed the jury that they needn't find such participation. Absent this, there was no way for the jury to make or refuse to make this inference necessary to find guilt.

The charge failed to direct the jury to determine whether possession had been sufficiently recent to justify the inference. Hall v. United States, 410 F.2d 147 (5th Cir. 1969); Devitt & Blackmar, FEDERAL JURY PRACTICE AND INSTRUCTIONS, §13.11. One of the essential elements of the knowledge from possession inference is that the possession must be "recent" in time to the theft. The greater the time span between the theft and possession, the less potent the inference. United States v. Matalon, 425 F.2d 70 (2d Cir. 1970); 1 Wharton, CRIMINAL EVIDENCE, §139 (13th ed. 1972); Devit & Blackmar, FEDERAL JURY PRACTICE AND INSTRUCTIONS, supra, §§13.11, 13.12. Whether possession here was sufficiently recent was an issue sharply contested by the

defense. According to Connor, the disappearance of the bills occurred some time in October 1969, while possession by any of the alleged participants did not occur until late February or early March 1970.

Appellant was entitled to have the jury evaluate the validity of the inference in light of the four and one-half months which had elapsed from the time of the theft. The failure so to instruct the jury was fundamental error.

Finally, the jury was not adequately apprised of the fact that a finding of possession did not mandate a finding of requisite knowledge. While, to be sure, the instruction described the inferences as only "prima facie" evidence of guilt, there was no explanation of this legal term to the jury of laymen. Nowhere did the Judge tell the jurors that they were not required to infer knowledge from possession or that, in fact, they could reject such an inference. Instead, the instruction that the inference from possession may be of controlling weight surely communicated to the jury the erroneous belief that if they found possession they need also find the knowledge necessary to convict.

Because the charge on knowledge necessary for the substantive crime was deficient, the charge on the element of knowledge essential to convict on the conspiracy count must also fail. Ingram v. United States, supra; United States v. Hysohion, supra. Therefore, because the Judge's charge on knowledge and the inference was inadequate, the conviction must still be reversed.

Point II

THE JUDICIAL AND THE PROSECUTORIAL ATTACK ON THE TESTIMONY OF THE WITNESS, WHO WAS CRITICAL TO THE DEFENSE, DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL AND MANDATES REVERSAL.

Melvin Berman who, according to the Government, was the impetus for the transfer of the Treasury bills, was called to testify for the defense. Berman's testimony was critical to the defense, not only because it provided evidence which substantively exonerated appellant, but also because it so fundamentally contradicted Norman's testimony that, if believed, it destroyed the only remaining evidence against appellant.*

Specifically, Berman testified that he did not know and had never seen either appellant or Poerio. This testimony squarely contradicted Norman's assertions that one of the meetings at appellant's apartment had been moved to a parked car so that Poerio could meet Berman who was allegedly waiting

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*While the Government had remaining its fingerprint testimony standing alone that would have been wholly inadequate to establish the requisite possession.

in the car. Moreover, contrary to Norman's testimony concerning the night Tavoularis came to Berman's house to pick up the sample, Berman catagorically denied that Anthony Tavoularis and Norman were ever at his home at the same time.* The import of this testimony was clearly that if Norman had lied about these events he might well have lied about others as well. That the jury perceived the importance of Berman's testimony is conclusively demonstrated by their request to have Norman's testimony, about which "we all have reservations," re-read to them (1097).

In this context, Judge Platt's unfair and prejudicial participation in Berman's examination spelled disasterous consequences for the defense. At the outset of the examination, the Judge pre-empted defense counsel's role, as he had not done with any other witness. When defense counsel objected to this obviously special scrutiny to which Berman was subjected the judge responded that he wanted to find out what this witness' background was before counsel

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*Although the Government sought on rebuttal to impeach this evidence by presentation through Agent Duggans of an alleged prior inconsistent statement by Berman, the Government had lost the memorandum of the statement. Consequently the jury's resolution of the issue turned on the evaluation of the witnesses' credibility. United States v. Nazzaro, 472 F.2d 302, 207 (2d Cir. 1973). Duggans, who mistakenly believed that Berman had been arrested, and was obviously confused about the substance of what Berman had allegedly said, then had little, if any, credibility.

asked him any questions. (814). The intervention did not cease. After the witness had testified on direct examination critically contradicting Norman, the prosecutor was substantially aided by the judge in his attempt to suggest that the witness, in cahoots with the defense, was lying. This was accomplished by endeavoring tc suggest that Berman had studiously (to the extent that he violated a court order) avoided any questioning by the authorities. The judge concluded the following hostile inquiry:

> BY MR. DOUGHERTY:
>
> Q Did you ever get to Long Island, to the Courthouse?
>
> A No.
>
> THE COURT: Were you under subpoena?
>
> THE WITNESS: Yes.
>
> THE COURT: And you didn't comply with the subpoena?
>
> THE WITNESS: I appeared in Brooklyn the day I was supposed to appear.
>
> THE COURT: What did the subpoena say? To appear in Brooklyn or Westbury?
>
> THE WITNESS: It said Federal Court. I suppose it said Westbury, your Honor --
>
> THE COURT: And you didn't obey the Court's subpoena?
>
> THE WITNESS: I did to the best of my ability.

THE COURT: Mr. Berman, did you read the subpoena?

THE WITNESS: Yes.

MR. LIGHT: I'm going to object to this entire questioning.

THE COURT: You are overruled. Did the subpoena say Westbury?

THE WITNESS: I imagine it did, your Honor.

THE COURT: And you didn't obey the subpoena?

THE WITNESS: As I say --

THE COURT: Now, listen to me. Did the subpoena say Westbury?

THE WITNESS: I believe so.

THE COURT: And you didn't go to Westbury?

THE WITNESS: Not that particular day, no.

THE COURT: All right. You may proceed.

Not only were defense counsel's objections overruled, but also ignored were counsel's expressed concern that the judge's "raised voice" when he asked the questions revealed to the jury what the judge believed about the case (820). Unquestionably the judge's conduct telescoped to the jury that he believed that Berman was lying. This Court has explicitly condemned judicial interrogation of defense witnesses designed to impeach their credibility and thereby assure con-

viction. United States v. Fernandez, 480 F.2d 726, 735 (2d Cir. 1973); United States v. Nazzaro, 472 F.2d 302 (2d Cir. 1973); Brandt v. United States, 196 F.2d 653 (2d Cir. 1952).

However, the prejudice here was not limited to the judge's misconduct; the prosecutor's conduct on cross-examination compounded the unfairness.

The thrust of the prosecutor's examination was as noted earlier to suggest that because Berman had previously refused to talk to the Government about these events, his eleventh hour testimony at trial was clearly a fabrication. To accomplish this end, the prosecutor,over repeated and strenuous objections by defense counsel, resorted to the tactic of injecting his personal credibility and knowledge, and thus the credibility of his office, into the jury's deliberations. The following questions are illustrative of this technique:

> QUESTION: Remember having a telephone conversation with me about two months ago?
>
> QUESTION: Was that pursuant to a letter received from me regarding the trial of this case?
>
> QUESTION: And do you remember the sum and substance of that conversation you had with me? [Emphasis added]

(818)

After objection, the questions continued:

> QUESTION: Do you recall making an appointment to come into my office for a particular day?
>
> QUESTION: You don't recall that?
>
> QUESTION: Did you ever come to my office?
>
> QUESTION: Have you moved in the last few weeks?
>
> (821-2)

The unmistakeable intent and effect of this interrogation was to communicate to the jury the prosecutor's unsworn evidence that he had personally sought, before trial, to obtain Berman's testimony and that Berman had been elusive because he intended to lie. Moreover, the reference to the "sum and substance of the telephone conversation" between the prosecutor and appellant suggested that Berman had told the prosecutor a version of the facts different from his testimony at trial. In United States v. Puco, 436 F.2d 761 (2d Cir. 1971) the Court reversed a conviction on prosecutorial misconduct similar to that which occurred here. When this conduct* is viewed in conjunction

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*The prosecutor's personal belief in Berman's perjury was further expounded upon in summation.

(Footnote continued on next page.)

with the judge's improper involvement in Berman's testimony, a reversal of appellant's conviction is required.

> The elusive Mel Berman. Mel Berman was testifying, subpoenaed to come in and testify at the last trial, and never made it to the court house out in Westbury. The Mel Berman who I arranged to come into my office, who never showed up. The Mel Berman who I submit moved within the last few weeks of this trial and left no forwarding address.
>
> All of a sudden, here comes Mel Berman, ready to give witness to the truth. His version of the truth has no resemblance to what you've heard here whatsoever. He doesn't know Mr. Poerio, he doesn't know Lou Daniels. He knows Stuart Norman.
>
> (Summation,1017)

Later he said:

> If you want to believe Mel Berman, that pyramid of virtue and honesty, then you believe him.
>
> I submit if you believe them we can pretty much bet J. Edgar Hoover will roll over in his grave.
>
> (Summation,1027)

These outbursts of obvious sarcasm and references to his own personal knowledge of facts outside the record were clearly improper and prejudicial. Moreover, these were not isolated remarks.Throughout his summation the prosecutor told the jury that he thought they should return a verdict of guilty (984) or that he thought Di Rienzo's testimony was credible (994). See United States v. Bivona, 487 F.2d 443 (2d Cir. 1973); United States v. White, 486 F.2d 204 (2d Cir. 1973). These last ditch attempts by the prosecutor to inject his credibility into the case, coming as they did, as the final partisan words spoken, no doubt were particularly damaging,and must not be condoned by this Court.

Point III

THE CASE MUST BE REMANDED FOR A HEARING TO DETERMINE WHETHER THE STRIKE FORCE ATTORNEY WHO PRESENTED THIS CASE TO THE GRAND JURY WAS AUTHORIZED TO DO SO.

Title 18, United States Code, §515(a), provides that in order for a Special Assistant validly to make a presentment to a Federal grand jury, he must be specifically authorized by the Attorney General of the United States to do so. Inadequate authorization goes to the validity of the ensuing indictment and requires dismissal.

The record is clear that the Strike Force was in charge of the prosecution of this case. Fred Barlow, a Special Assistant to the Justice Department, was the lawyer who presented the case to the grand jury. If the Attorney General's letter appointing Barlow to his prosecutorial post is not sufficiently specific to authorize this prosecution, the indictment must be dismissed. United States v. Crispino, 74 Cr. 932 (S.D.N.Y., February 13, 1975), appeal pending.*

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*Since Crispino, supra, was decided after the trial in this case, appellant can properly raise this issue on appeal despite the absence of objection below.

CONCLUSION

For the foregoing reasons, the judgment of conviction must be reversed and the indictment dismissed; in the alternative, the case must be remanded for a new trial and for a hearing on the issue of the validity of the prosecutor's authorization to present the case to the grand jury for indictment.

Respectfully submitted,

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March 10, 1975

CERTIFICATE OF SERVICE

March 10, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Charles Ingber